92-857
No.

Supreme Court, U.S.
FILED
AUG 13 1992
OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

CARVEL GORDON DILLARD,
Petitioner

versus

SECURITY PACIFIC CORP.;
MERRILL LYNCH, PIERCE FENNER & SMITH, INC.;
SECURITIES INDUSTRY ASSOCIATION, INC.;
SECURITY PACIFIC BROKERS, INC.;
FINANCIAL CLEARING & SERVICES CORPORATION;
JENKINS & GILCHRIST (A PARTNERSHIP); and
JENKINS & GILCHRIST (A PROFESSIONAL CORP.)
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Carvel Gordon Dillard, pro se
903 SW Central
Grants Pass, OR 97526
(503) 479-0098

STATEMENT OF QUESTIONS PRESENTED:

1. Whether this court should overturn the appeals court's ruling that illegal denial of the fundamental constitutional right to judicial trial and to trial by jury is properly remedied by award of economic damages only and that there is no right to demand specific performance.

2. Whether this court should overturn the appeals court's ruling that the arbitration contract is still binding and enforceable even if it is proven that it was an adhesion demand compelled by the duress of an illegal monopolistic restraint of trade.

3. Whether this court should enjoin defendants and their co-conspirators from uniformly adopting and agreeing to use, and in using exclusively, margin and option account contracts which contain provisions for the determination of all claims and controversies arising under said contracts in arbitration.

4. Whether this court should find that the appeals court made error by allowing the district court to ignore requests under F.R.C.P. 52 for findings of fact and conclusions of law concerning injunction and issue of illegal arbitration contract.

5. Whether this court should declare it to be an abuse of discretion in violation of F.R.C.P. 8 (f) to consolidate the three actions and then for the appeals court to declare that for some but not all purposes of the mandate the appeals court was pretending that it was ignorant of the related actions instead of considering the three actions as a whole.

6. Whether it is error that the appeals court ruled that although Dillard pleaded that he had been falsely arrested and imprisoned for illegal ulterior motives such facts, if proven to be true, created no violation of his civil rights under Title 42.

7. Whether it is error that the appeals court refused to review the district court's ruling that there was no private right of action under the Hobbs Act, 18 U.S.C. Section 1951 and it's ruling that there is no private right of action under the RICO Act, 18 U.S.C. Section 1961 et seq. for a violation of the Hobbs Act.

8. Whether it is error that the appeals court ruled that there is no private right of action under Section 17(a) of the Securities Act of 1933.

9. Whether incorrect or misleading statements in the appeals court's statement of the facts should be corrected by this court.

10. Whether the record of these actions shows that the court of appeals has ignored the district courts departure from the accepted and usual course of judicial proceedings in so far a manner as to call for an exercise of this court's power of supervision.
Shall this court affirm the rule of law by reviewing this petition or shall this court ratify the rule of men by allowing the lower courts to arbitrarily ignore the obvious?
The district court at Houston often ignores the obvious in order to suppress pro se litigation. The precise allegations which would compel trial of the legality of the arbitration clause that the Fifth Circuit stated were missing are in fact exhibited in the record appendixed hereto.

C.

TABLE OF CONTENTS

I. Statement of the Questions

VI. Table of Contents

VII. Table of Authorities

2,4,
5,6. Grounds of Jurisdiction

1. Statement of the Case

7. Argument

APPENDIX
(In two separately bound volumes)

VOLUME 1, pages 1-150
Dillard vs. Merrill Lynch

H-85-4135	District Court
89-2590	Fifth Circuit
90-2722	Fifth Circuit

VOLUME 2, pages 151-317
Dillard v. Security Pacific Brokers, Inc. et al

H-86-3251	District Court
87-2673	Fifth Circuit
91-2135	Fifth Circuit

Dillard vs. Security Pacific Corp. et al

H-88-2348	District Court
89-2583	Fifth Circuit
90-2761	Fifth Circuit

TABLE OF AUTHORITIES

Cases

Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S. Ct. 809, 81 L. Ed. 1177 (1937) 36

American Airlines, Inc. v. Louisville & Jefferson County Air Board, 269 F. 2d 811, 816 (6th Cir. 1959) 16

American Safety Equipment Corp. v. J.P. Maguire & Co. 391 F.2d at 825 46

Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 567 F.2d 1174, 1178 (2nd Cir 1977) 14

Atlas Roofing Co., 430 U.S. at 455 20

Atlas Roofing Co. v. Occupational Safety and Health Review Commission, 430 U.S. 442, 449 (1977) 19,20

AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648-9 (1986) 17

Bailey v. Central Vermont R. Co., 319 US 350, 87 L ed 1444, 63 S.Ct. 1062 38

Baylis v. Traveler's Insurance Co., 113 U.S. 316 39

Bernhardt v. Polygraphic Co. of America, 350 U.S. 198, 203 (1956) 18,22

Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 848, 853-855 (1986) 19,20

Dean Witter Reynolds Inc., 470 U.S. at 218-219 15

De Filippo v. Ford Motor Co. (1975, CA3 Pa) 516 F2d 1313, cert den 423 US 912, 46 L Ed 2d 141, 96 S Ct 216 45

D.H. Overmyer Co. v. Frick Co., 405 U.S. at 183 21,22

Eastern Marine Corporation v. Fukaya Trading Co., 364 F. 2nd 80 (Fifth Circuit 1966) 55

Elmore v. McCammon 640 F. Sup. 905 (S.D. Tex. 1986) 63

Fuentes v. Shevin, 407 U.S. 67, 32 L. ed 2nd 556, 92 S Ct. 1983 36

Geldermann, Inc. v. Commodity Futures Trading Commission, 836 F.2d 310, 316 (7th Cir. 1987), cert. denied, S. Ct. 54 (1988) 19

Heine v. Wright, 76 Cal App 338, 244 P. 955, 956 40

Heyman v. Kline, 456 F. 2nd 123, 129 (2nd Cir. 1972), cert denied, 409 U.S. 847, 93 S. Ct. 53, 34 L. Ed. 2nd 88 (1972) 36

Hodges v. Easton, Wis. 1882, 1 S. Ct. 307, 106 U.S. 412, 27 L. Ed 169 35

Jacob v. City of New York, 315 U.S. 752, 86 L. Ed 1166, 62 S. Ct. 854 39

Johnson v. Zerbst, 304 U.S. 458, 58 Ct. 1019, 82 L. Ed. 1461 (1938) 36

Keystone Shipping, 855 F. 2d at 3 16

K.M.C. Co. v. Irving Trust Co. 757 F 2nd at 756 21

Lervic v. White Top Cabs, La. App., 10 So. 2nd 67, 68, 73 40

May v. Lakeland Highlands Canning Co., 309 U.S. 310, 316, 60 S. Ct. 517, 520, 84 L.Ed 774, 779 34

Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) 18,24

National Equipment Rental Ltd. v. Hendrix, 565 F. 2nd 255, 258 (2nd cir. 1977) 22,36

Paramount Famous Lasky v. United States 34 F. 2nd 984, 282 U.S. 30 29,51

Perry v. Thomas, 107 S. Ct. at 2527 n. 9 23

Pierson v. Dean, Witter, Reynolds, Inc. 742 F.2d 334, 339 (7th Cir., 1984) 19

Prima Paint Corp. v. Flood & Conklin Mfg., 388 U.S. 395 (1967) 10

Robert Lawrence Co. v. Devonshire Fabrics, Inc. C.A. N.Y. 1959 271 F. 2nd 402 Certiorari Dismissed 81 S. Ct. 27, 364 U.S. 801, 5L Ed. 2nd 37 56

Shearson/American Express, Inc. v. McMahon, 107 S. Ct. at 2337 18

U.S. v. Huck Co. 214 F Supp. at page 778 28

U.S. v. First National Pictures, Inc. 282 U.S. 44 Supp. at page 778 29

United States v. Paramount Picture, Inc. (1948) 334 U.S. 131, 142 68 S. CT. 915, 921, 92 L. Ed. 2D 1260, 1285 51

Waldron v. Cities Service Co. 361 F.2d 6712, 673 (2d Cir. 1966), cert. granted 385 U.S. 1024, 87 S. Ct. 743, 17 L. Ed. 2d 672 (1967) 46

White and White v. American Hospital Supply 540 F. Supp. at 958 25

Wicks v. Atlanta Marine, Inc. 605 F 2nd 166, 168 (Fifth Circuit 1979) 55

Wotkyns v. D.E. Jones Commodities, Inc., 791 F.2d 749, 750 (9th Cir. 1986) 14

Constitution of the United States

Article III, 2 19,20,22

Fourteenth Amendment 23

Seventh Amendment 18,19,20,22,36,37,38,57

Federal Statutes

Federal Arbitration Act 8

Sherman Act passim

R.I.C.O. Act 4,5,59

Clayton Act 4

Federal Regulations

17 CFR 180.3 (b)(1988) 14

CFTC Rule 180.3 (b) 13

F.R.C.P. Rule 52(A) 33,34,35,53,54
F.R.C.P. Rule 7,10,12 53
F.R.C.P. Rule 8 III,53,58
F.R.C.P. Rule 23 46

Federal Legislative Materials

134 Cong. Rec. E 2233	13
134 Cong. Rec. E 2239-41	13
134 Cong. Rec. E 2245-46	13
S. Rep. No. 536 at 3	17

Secondary Materials

2B Barron & Holtzoff, Federal Practice and Procedure 1126 (1961)	34
5 Moore's Federal Practice paragraph 52.06[2] at 2718 (2d ed. 1969)	34
Anti-trust Law and Economics third edition by Ernest Gellhorn	26
Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions, 95 Yale L.J. 1459 (1986)	20

STATEMENT OF THE CASE

In 1980, plaintiff, petitioner, Dillard invested over one million dollars with securities services companies.

In 1983 Dillard, lost a substantial amount of money at the direction of Merrill Lynch Pierce Fenner and Smith, Inc. (herein "Merrill Lynch"). As things soured with Merrill Lynch Dillard began moving his remaining assets from Merrill Lynch to other brokers, and began trading with other brokers instead of Merrill Lynch; one of which was defendant Security Pacific Corporation, through it's subsidiaries defendant Security Pacific Brokers and defendant Financial Clearing and Services Corporation (herein "Security Pacific").

Merrill Lynch informed Security Pacific of Dillard's excellent credit and Dillard began to trade on credit extended by Security Pacific.

Dillard ordered the transfer of about $86,661 from his, at that moment about

$250,000 value, Merrill Lynch account to his Security Pacific account.

Security Pacific was grossly negligent and failed to liquidate a short position for a loss of about $50,000.

Merrill Lynch breached a contract by failing to deliver all of 52,000 shares of Superior Oil stock.

Dillard sued Merrill Lynch for $256,500 under the provisions of Section 10B of the Securities Exchange Act of 1934, 15 U.S.C. Section 78 J(B) and 17 C.F.R. Section 240.10B5 and Section 17(A) of the Securities Act of 1933 and under the Texas Deceptive Trade Practices Act, Tex. Business and Com. Code Ann. Section 17.41 et. seq. and for common law fraud. H-85-4135 was filed in Federal Court since there was both federal question under 28 U.S.C. 1331 and also diversity jurisdiction under 28 U.S.C. 1332 (A)1. Dillard refused to pay Security Pacific the $50,000. Security Pacific sued Dillard for $56,256 (H-84-

1079). Merrill Lynch moved to compel arbitration and Dillard repudiated arbitration and demanded jury trial and made motion for anti-trust injunction. Security Pacific then made criminal charge against Dillard claiming theft of Dillard's $86,661 claiming it as their own. Security Pacific obtained a default judgement in H-84-1079 due to the harsh application of rules of which Dillard was ignorant. Dillard sued Security Pacific for negligence and securities fraud concerning the $50,000 short sale loss and for defamation, conspiracy, false swearing, bribery, extortion, and racketeering concerning the criminal charges (H-86-3251). Three successive no probable cause criminal prosecutions instigated by Security Pacific, solely for the perverse purpose of gaining a bargaining advantage in the civil litigation, and promoted by Merrill Lynch and Jenkins & Gilchrist were quashed and dismissed.

H-86-3251 was dismissed and appealed and overturned and remanded; the dismissal of the $50,000 negligence and securities fraud claim was upheld due to the prior default but the dismissal of the R.I.C.O. and all other charges stemming from the criminal prosecution was reversed. Supplemental complaint to H-86-3251 was filed naming Merrill Lynch and Jenkins & Gilchrist as defendants and co-conspirators and naming the parent corporation, Security Pacific Corp. as defendant and adding additional charges of malicious prosecution, abuse of process, and anti-trust violations to the complaint; Securities Industry Association was added as an anti-trust defendant. The supplemental complaint was stricken.

H-88-2848 was filed in place of the stricken supplemental complaint in order to be sure that the new causes of action could not be lost to statute limitations. H-88-2848 charged violation of the Sherman Act, Clayton Act, R.I.C.O. Act, Hobbs Act,

malicious prosecution abuse of process, defamation and securities fraud claims. Orders of dismissal and abatement were entered in H-88-2848 and were vacated upon appeal. Arbitration was ordered in H-85-4135 and the action was finally dismissed. Order of dismissal and abatement was again entered in H-88-2848 and again appealed this time in consolidated appeal with H-85-4135.

H-86-3251 was ordered to be re-pleaded in amended complaint. First amended complaint included violation of R.I.C.O. Act, 18 U.S.C. Section 1961 et. seq., Hobbs Act, 18 U.S.C. Section 1951, defamation, abuse of process, and malicious prosecution. Title 42 civil rights violations charging false arrest and false imprisonment were added and the bribery charge was dropped as were the securities fraud charges. The court refused to allow the addition of any new defendant. H-86-3251 was dismissed and appealed and was

consolidated in appeal with H-88-2848 and with H-85-4135.

H-88-2848 and H-86-3251 were affirmed in part and reversed in part and remanded. The final dismissal of H-85-4135 was affirmed. In consolidated appeal the three actions were appealed to the Supreme Court of the United States on Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

The judgement sought to be reviewed was entered May 15, 1992. Copy of the judgement can be found in the Appendix attached hereto.

The application for Writ of Certiorari is made under the provisions of 28 U.S.C. Section 2101(C) and other applicable federal statutes.

ARGUMENT

The Fifth Circuit has arbitrarily decided that Dillard has not shown the loss of his right to trial by jury to be unfair or oppressive. Dillard disputes the appeals court's finding that his loss is not oppressive and unfair; but he also states that it is nowhere found in the Constitution that he must show that loss of his right to trial by jury is oppressive and unfair in order to maintain that right.

The Fifth Circuit has in effect ruled that a fundamental constitutional right can be illegally taken away without consent and that the exclusive remedy is monetary damages; although Dillard demands specific performance and the Constitution of the United States guarantees specific performance. This precedent is illegal and it is dangerous to the welfare of the people of the United States.

While this court in recent years has expanded the types of statutory claims that may be subject to arbitration agreements,

it has not gone so far as to interpret the Federal Arbitration Act (FAA) to require arbitration in the absence of consent. Nor has it given license for securities services firms to use excessive economic power to force consumers into signing away their judicial remedies in favor of arbitration. On the contrary, the court's recent cases are premised on the assumption that arbitration is voluntary and consensual.

Many investors waive their right to a judicial forum by signing arbitration agreements involuntarily. However, the law is that there can be no involuntary waiver. The proposed injunction will correct this anomalous contradiction. Small investors have no choice but to accept pre-dispute, standard-form, brokerage arbitration clauses in order to invest in securities.

Congress enacted the FAA in order to ensure the enforceability of valid arbitration agreements. The Act and its

legislative history demonstrate, however, that Congress was concerned that only voluntary arbitration agreements be enforced, and not agreements that are contained in adhesion contracts which are the product of excessive bargaining power.

Arbitration agreements involve the waiver of the important constitutional right to a jury trial.

This court must place arbitration agreements on the same footing as other consumer contracts generally and must be consistent with common law principles on adhesion contracts.

Dillard does not ask to limit the use of the arbitration process. Rather, he asks that fair arbitration be promoted by enhancing the integrity of the process and if arbitration is to have integrity it must be entered by the choice of the consumer.

The goal of the FAA was not to achieve as much arbitration as possible but rather to assure that arbitration contracts had equal standing with any contract. The

Fifth Circuit's decision in the instant action places arbitration contracts in a class by themselves by requiring a much greater, but not clearly specified burden ("our case law has not established the precise showing a party must make" page 4742 paragraph 1 of opinion) upon the party repudiating the arbitration contract than would be required of any other contract.

See Prima Paint, 388 U.S. at 404 n.12 ("the purpose of Congress in 1925 was to make arbitration agreements as enforceable as other contracts, but not more so.")

The FAA requires that agreements to arbitrate be deemed "valid, enforceable and irrevocable, save upon grounds as exist at law or in equity for the revocation of any contract."

Currently most brokers simply refuse to do business unless a customer signs the arbitration agreement.

A survey by the Division of Market Regulation of the Securities and Exchange

Commission (SEC) demonstrates the growing trend by brokers to require arbitration agreements for all accounts.

The SEC surveyed the use of arbitration agreements at sixty-five firms (all Securities Industry Association members) that account for approximately ninety percent of all customer trading accounts in the United States, including the twenty-five largest New York Stock Exchange member firms. Ninety percent required arbitration agreements for margin accounts, and ninety-five percent required agreements for option accounts. Twenty of the sixty-five responding firms said that they intended or were considering expanding the number of accounts for which an arbitration clause would be required.

That brokerage firms uniformly require arbitration agreements and do not offer arbitration-less accounts even at higher prices suggests a classic market failure. Investors do not shop for brokerage firms on the basis of arbitration clauses because

competition is restrained and controlled by a monopoly.

Under the rules of the self-regulatory organizations, the customer already has the right -- but not the obligation -- to arbitrate any future dispute he may have with the brokerage firm. By agreeing in advance to arbitrate disputes, the customer is reducing his future freedom of action, without receiving any benefit in return.

The growing use of arbitration agreements in the securities industry has led the North American Securities Administrators Association (NASAA) and others to call for federal and state regulation to ensure that agreements are voluntary. In December, 1987, NASAA urged Congress to require brokers to negotiate the agreements.

The proposed "Securities Arbitration Reform Act of 1988," J.R. 4960, 100th Cong., 2d Sess. (June 30, 1988), for example, would have required disclosure and

prohibited brokers from making pre-dispute arbitration clauses a condition of doing business. See 134 Cong. Rec. E 2233 (remarks of Cong. Boucher); E 2239-41 (remarks of Cong. Dingell); E 2245-46 (remarks of Cong. Markey) (daily ed. June 30, 1988), 676-683 (Statements regarding H.R. 4960).

The brokers lobby managed to kill the bill, but the reasons for it's proposal remain outstanding and cry for attention.

Many people recognize the inequity of the current situation and have proposed new law to remedy the inequity. But it is clear that all that is necessary to restore traditional standards of equity is enforcement of existing law - and the injunction requested in this action is an overdue enforcement of existing law.

The Commodity Futures Trading Commission (CFTC) has had arbitration rules since 1976. CFTC Rule 180.3 (b) precludes a commodity broker from entering into a mandatory pre-dispute arbitration agreement

with a customer unless, inter alia, the agreement is not a condition for the customer to utilize the services of the broker, and it contains cautionary language in large bold-face type, which must be separately endorsed by the customer that enumerates the customer's rights and the legal effect of the agreement. 17 CFR 180.3 (b)(1988).

The CFTC regulations were promulgated "to assure that the investor's agreement to compulsory arbitration [of disputes arising out of commodity futures transactions] is 'truly voluntary on the part of the customer'" Wotkyns v. D.E. Jones Commodities, Inc., 791 F.2d 749, 750 (9th Cir. 1986); see also Ames v. Merrill Lynch, Pierce, Fenner & Smith, Inc. 567 F.2d 1174, 1178 (2nd Cir 1977) "It . . . became apparent [to the CFTC] that in many cases arbitration was not undertaken voluntarily by customers, but that customers were compelled to agree to predispute

arbitration clauses as precondition to doing business."

While the proposed injunction may go to to the heart of the process of forming contracts, it does not strike at the heart of the purpose of the FAA, which is to ensure that voluntary arbitration agreements are enforced. See Dean Witter Reynolds Inc., 470 U.S. at 218-219. (FAA expresses Congressional intent to enforce arbitration agreements to the same extent of any other contract, not Congressional intent to prefer arbitration as a dispute resolution mechanism).

In enacting the FAA in 1925 the purpose of Congress was "to make valid and enforceable written provisions of agreements for arbitration of disputes arising out of contract[.]" S. Rep. No. 536, 68th Cong., 1st Sess., 1 (1924). The Act was directed at courts which, "jealous of their own power," had refused to enforce agreements to arbitrate. "[T]he legislative history reveals that what the

Congress intended was merely to overrule by legislation long-standing judicial precedent, which declared agreements [to arbitrate] contrary to public policy, on grounds that enforcement of such agreements would oust the courts of their jurisdiction." American Airlines, Inc. v. Louisville & Jefferson County Air Board, 269 F. 2d 811, 816 (6th Cir. 1959).

The authors of the FAA emphasized that the arbitration agreements to be enforced under the Act were limited to voluntary agreements. The FAA "was passed to ensure that courts would honor the contractual agreements of parties who choose to resolve their disputes by means of the informal arbitration procedure." Keystone Shipping, 855 F. 2d at 3 (emphasis added). The Senate report refers to "the great value of voluntary arbitrations" and the "practical justice in the enforced arbitration of disputes where written agreements for that purpose have been voluntarily and solemnly

entered into." S. Rep. No. 536 at 3 (emphasis added). Similarly, a sponsor of the FAA stated that the "bill simply provides for one thing, and that is an opportunity to enforce an agreement . . . to arbitrate, when voluntarily placed in the document by the parties to it." 65 Cong. Rec. 1931 (1924)(Rep. Graham)(emphasis added).

The "savings clause" in Section 2 of the FAA explicitly reflects Congressional concern that only those arbitration agreements voluntarily entered should be enforced. Arbitration agreements which are the products of compulsion by monopoly provide "grounds as exist at law or in equity for the revocation of any contract". The savings clause also reflects the principles that arbitrators derive authority to resolve disputes only from the voluntary agreement of the parties, see AT&T Technologies v. Communications Workers of America, 475 U.S. 643, 648-9 (1986), and that, absent voluntary agreement, there is

no constitutional, statutory, or common-law "right" to insist upon the arbitration of a dispute.

While expanding the scope of arbitrable claims, this court has emphasized the need for courts to be vigilant in policing the savings clause. See Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) "courts should remain attuned to well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide 'grounds for the revocation of any contract'"; Shearson/American Express, 107 S.Ct. at 2337 (emphasis added).

Congress' concern that only voluntary arbitration agreements be enforced was based in part on constitutional concerns because arbitration necessarily entails relinquishment of one's Seventh Amendment right to a jury trial (see Bernhardt v. Polygraphic Co. of America, 350 U.S. 198,

203 (1956); Pierson v. Dean, Witter, Reynolds, Inc. 742 F.2d 334, 339 (7th Cir., 1984) or an Article III forum, at least to the extent a dispute involves state common law or state statutory claims. See Commodity Futures Trading Commission v. Schor, 478 U.S. 833, 848, 853-855 (1986) (Article III normally confers personal right to "an impartial and independent federal adjudication" of state law claims); Geldermann, Inc. v. Commodity Futures Trading Commission, 836 F.2d 310, 316 (7th Cir. 1987), cert. denied, S. Ct. 54 (1988).

"The Seventh Amendment provides that '[i]n Suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...' The phrase 'Suits at common law' has been construed to refer to cases tried prior to the adoption of the Seventh Amendment in courts of law in which jury trial was customary as distinguished from courts of equity or admiralty in which jury trial was not." Atlas Roofing Co. v.

Occupational Safety and Health Review Commission, 430 U.S. 442, 449 (1977).

Article III extends the judicial power of the United States to "all cases, in Law and Equity." U.S. Constitution, art. III, 2. "[A] 'private' right for which state law provides the role of decision ... is ... a claim of the kind assumed to be at the 'core' of matters normally reserved to Article III courts." Commodity Futures Trading Commission v. Schor, 478 U.S. at 853. Analysis under the Seventh Amendment and Article III is similar when considering whether Congress may assign the adjudication of certain claims to a non-judicial form. See: Atlas Roofing Co., 430 U.S. at 455 and Article III Implications for the Applicability of the Seventh Amendment to Federal Statutory Actions, 95 Yale L.J. 1459 (1986).

During the hearings on the FAA, Congress was assured that "'[t]he constitutional right to jury trial is

adequately safeguarded' by the Act." Prima Paint, 388 U.S. at 413 (Black J., dissenting).

Mr. Cohen, the American Bar Association's draftsman of the bill, assured the members of Congress that the Act would not impair the right to a jury trial, because it deprives a person of that right only when he has voluntarily and validly waived it by agreeing to submit certain disputes to arbitration (emphasis added).

The arbitration contract in question here (90-2722, page 202-203, paragraph 9) would necessarily not withstand scrutiny under constitutional waiver analysis. D.H. Overmyer Co. v. Frick Co., 405 U.S. at 183 (more than contract law involved in waiver of constitutional rights); K.M.C. Co. v. Irving Trust Co. 757 F.2d at 756. Even if arbitration may be a commercially reasonable substitute for a judicial forum in many circumstances, and is often more desirable than litigation because of its

relative speed and cost, arbitration does not offer the same guarantee of a fair and independent adjudication that is provided by a Seventh Amendment jury trial or an Article III life tenured federal judge.

D.H. Overmyer Co. v. Frick Co., 405 U.S. 174, 188 (1972) - Contractual waiver of due process rights may be unconstitutional "where the contract is one of adhesion, where there is great disparity in bargaining power; National Equipment Rental, Ltd. v. Hendrix, 565 F.2d 255, 258 (2nd Cir. 1977) Contractual waiver of right to jury trial is ineffective when there was "gross inequality in bargaining power".

As the court noted in Bernhardt v. Polygraphic Co. "The change from a court of law to an arbitration panel may make a radical difference in ultimate result. Arbitration carries no right to trial by jury that is guaranteed by the Seventh Amendment... Arbitrators do not have the

benefit of judicial instruction on the law; they need not give their reasons for their results; the record of their proceedings is not as complete as it is in a court trial; and judicial review of an award is more limited than judicial review of a trial ..." 350 U.S. at 203. These characteristics remain accurate today. See Shearson/American Exp., Inc. v. McMahon, 107 S.Ct. at 2354 (Blackmum, J., dissenting). Loss of property in an arbitration proceeding compelled without consent where mistake of law is no grounds for reversal is a violation of the Fourteenth Amendment wherein it states "Nor shall any state deprive any person of ... property without due process of law..."

This court has indicated that "excessive economic power" would provide grounds for the revocation of an arbitration agreement. Shearson/American Express, Inc. v. McMahon, 107 S. Ct. at 2337; also Perry v. Thomas, 107 S. Ct. at 2527 n. 9 (sending unconscionability claim

back to lower court). But the Fifth Circuit has ruled in the instant action that use of excessive economic power is not unfair nor is it unconscionable.

By ensuring that broker-customer arbitration agreements are voluntary, the injunction will enhance the integrity of the arbitration process and minimize the need for judicial enforcement of arbitration agreements and awards.

The injunction thus serves to protect against claims "that the agreement to arbitrate resulted from the sort of fraud overwhelming economic power that would provide grounds 'for the revocation of any contract.'" Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 627 (1985) (quoting 2 of the Act). With the option of not signing and still opening an account, securities customers who refuse arbitration will again have access to the options and margin account market which access is currently totally

denied by the defendant's group boycott. See White and White v. American Hospital Supply 540 F. Supp. at 958 wherein "it is sufficient, to establish illegal boycott, if members of boycott have collective capacity to deny their victims access to the market."

The proposed injunction has many beneficial effects. The anti-competitive effect of uniform denial of services to force arbitration upon consumers who do not want to arbitrate is prohibited. Services can not be denied on the basis of rejection of mandatory arbitration because the injunction forces compliance with the no consent no waiver imperative which is integral to the intent of the FAA.

The defendants have not denied the existence of the monopoly. Instead all their rebuttal is directed toward refuting the allegation of conspiracy to monopolize. Their premise being that if the monopoly was an accident it is not illegal. But they ignore the prohibitions in Section 2

of the Sherman Act against the economy damaging condition of monopoly exclusionary actions regardless of how created.

Anti-trust Law and economics third edition by Ernest Gellhorn: "Several general observations about the Sherman Act serve as a guide to understanding it. Note how the basic thrust of the two sections differs. Section 1 requires duality of action. One person cannot contract, combine or conspire by himself; the essence of the offense is the act of joining together. Section 2, on the other hand, applies to unilateral conduct: "every person who ..." Consequently the case law under Section 1 is often concerned with finding some agreement, as opposed to that of Section 2 where the prime concern is a structural condition (monopoly).

Section 1 focuses on restrictive agreements (wrongful purposes or effects) while Section 2 examines the aggrandizement or misuse of monopoly power (exclusionary

actions). True, both sections seek ultimately the same end - curtailment of practices resulting in market control - but Section 2 is generally limited by a threshold finding of monopoly power. Even though the two sections approach the monopoly problem differently, it is clear that the means by which markets are controlled or competition dampened is a matter of indifference. Ultimately it is irrelevant whether a trade restraint was accomplished by a contract or by some looser form of agreement, or even by the sheer aggregation of market power."

Conspiracy is a jury issue. But the monopoly, the sheer aggregation of market power and the misuse of that power by concerted denial of necessary services to force waiver of constitutional rights is not at issue it is common knowledge and it is admitted by the monopolist defendants in this action. And it is evidence substantiating Dillard's claim of no valid contract to arbitrate - evidence that the

Fifth Circuit in error ignored. The paradox is that the Fifth Circuit remanded the anti-trust action for trial but refused to consider that there is any difference between an adhesion contract (1) and an adhesion contract illegally compelled by restraint of trade by monopoly (2). (1) may be legal but (2) is certainly void and illegal.

"An agreement might be considered to achieve monopoly power when adopted by firms enjoying 80% of the market" U.S. v. Huck Co. 214 F. Supp. at page 778. In the instant action it has been conclusively established that we have an agreement adopted by firms enjoying 95% of the options account market and the underlying dispute with Merrill Lynch occurred in an options trading account. Options accounts are "... any part of the trade or commerce..." and as such are covered under the Sherman Act proscriptions against monopolizations and restraints and an

identical situation of a trade organization adopting a uniform arbitration clause and imposing it on consumers by denial of services has been found to be a violation of the Sherman Act by this Court in Paramount Famous Lasky v. United States 34 F. 2nd 984, 282 U.S. 30. See also U.S. v. First National Pictures, Inc. 282 U.S. 44.

Even if the arbitration to be had was fair, there was still no contract to arbitrate since the essential element of consent is missing from the arbitration contract. Adhesion contracts may be legal if they are not compelled by monopoly but compulsion by monopoly is unfair and unconscionable and an adhesion contract compelled by monopoly is certainly null and void. Therefore the decision of the arbitration panel must be void because the order to arbitrate was made in the absence of any binding contract compelling arbitration and over the constant objection of Dillard who demanded judicial determination of the dispute and trial by

jury.

Fairness of the arbitration process should not be an issue since compulsory arbitration is entirely a creature of contract. The making of the contract is the controlling issue because if there is no contract there can be no order to arbitrate. But it can be demonstrated that the arbitration process is not fair.

The primary problem with arbitration before a panel that is invited and compensated by the industry is that the industry can manipulate the panel. Those arbitrators that rule that the industry must pay damages in certain kinds of complaints or that rule for large or punitive damages are simply not invited back. Those arbitrators who conform to the desires of the industry concerning amount and type of damages can expect repeated employment.

The industry realizes that to win too often is counterproductive. So they

restrain themselves to elimination of large damages and to maintaining a capacity to control which they exert to controlled advantage.

Dillard did not consent to arbitrate. Dillard has raised issue of illegal arbitration contract in the pleadings of H-85-4135 (item 16 p.108 and item 17 p.138 Appendix) Plaintiffs Motion for Trial by Jury Restricted to Specific Issue of the Arbitration Agreement) and in Complaint of H-88-2848 (see 90-2761 item 33 page 251). In both the motion and complaint the pleading of Dillard is identical: "Assent was not voluntary, it was coerced by the advantage of defendants which was unlawfully exercised. Unlawful advantage of defendants consisted of threat to prohibit trade of plaintiff in securities. The threat constituted duress which induced plaintiff to sign the contract contrary to plaintiff's will and to plaintiff's detriment. Defendants' threat of restraint of plaintiff's trade overcame plaintiff's

will and liberty of discretion to such an extent as to influence plaintiff to act in a way that plaintiff's judgement and discretion would condemn and prompt him not to do, if free from such influence."

Since Merrill Lynch never filed any answer to the complaint and they neglected entirely to deny the allegation of duress by restraint of trade in the motion this court must consider that for purposes of this appeal that every allegation in the underlined quotation is proven.

There was no consent and without consent there is no waiver of right to judicial remedy. The arbitration must be declared to be null and void. The arbitration was improperly and illegally compelled under the terms of an alleged arbitration contract which because of the illegal conditions under which it was imposed is no contract.

Injunction should be issued by this court prohibiting monopolization of two

securities markets: options accounts and margin accounts by defendants and their co-conspirators by their adopting and agreeing to use, and in using exclusively, as a precondition of any trading, margin and option contracts which contain provisions requiring the determination of all claims and controversies arising under said contracts in arbitration.

In failing to make findings and conclusions on the injunction and on the material issue of the legality of the arbitration contract, the trial court in H-85-4135 violated Rule 52(a) of the Federal Rules of Civil Procedure. Rule 52(a) provides in pertinent part that "[i]n all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its

action." 2B Barron & Holtzoff, Federal Practice and Procedure 1126 (1961). In the words of this court, a full and fair compliance with Rule 52(a) "is of the highest importance to a proper review of the action of a court in granting or refusing a preliminary injunction." May v. Lakeland Highlands Canning Co., 1940, 309 U.S. 310, 316, 60 S. Ct. 517, 520, 84 L.Ed. 774, 779; "[W]here the trial court fails to make findings, or to find on a material issue, and an appeal is taken, the appellate court will normally vacate the judgement and remand the action for appropriate findings to be made." 5 Moore's Federal Practice paragraph 52.06[2], at 2718 (2d ed. 1969).

However, the appellate court did not do that and now this court may instead grant or refuse the requested injunction itself and provide findings of fact and conclusions of law upon it's own decision since compliance with Rule 52(a) is not a

jurisdictional requirement for appeal. Dillard does so move this court.

Dillard made motion for preliminary injunction 9/11/85 - it was ignored. Dillard made Rule 52 motion for findings of fact and conclusions of law on the injunction request on 3/4/88. The Rule 52 motion was denied without any explanation whatsoever on 1/29/90. Why so long? Because pro se litigation is delayed if it cannot be dismissed at the U.S. District Court's Houston Division.

"Trial by jury is a fundamental guaranty of the rights and liberties of the people; consequently every reasonable presumption should be indulged against it's waiver" Hodges v. Easton Wis. 1882, 1 S. Ct. 307, 106 U.S. 412, 27 L. Ed 169. "Party seeking enforcement of waiver of right to jury trial which is claimed under contract executed before litigation is contemplated must prove that consent was both voluntary and informed." See Leasing Service Corp. v. Crane, C. Association 4

(N.C.) 1986, 804 F. 2nd 828 and National Equipment Rental Ltd. v. Hendrix, 565 F. 2nd 255, 258 (2nd cir. 1977).

"It is elementary that the Seventh Amendment right to a jury is fundamental and it's protection can only be relinquished knowingly and voluntarily", see: Johnson v. Zerbst, 304 U.S. 458, 58 Ct. 1019, 82 L. Ed. 1461 (1938). Heyman v. Kline, 456 F. 2nd 123, 129 (2nd Cir. 1972), cert denied, 409 U.S. 847, 93 S. Ct. 53, 34 L. Ed. 2nd 88 (1972). Indeed, a presumption exists against it's waiver. See Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393, 57 S. Ct. 809, 81 L. Ed. 1177 (1937). "In the civil no less than the criminal area, courts must indulge every reasonable presumption against waiver of fundamental rights." Fuentes v. Shevin 407 U.S. 67, 32 L. ed 2nd 556, 92 S Ct. 1983. The Fifth Circuit has ruled contradictorily in the instant action that a presumption exists for a waiver.

In order to prove the lawfulness of their arbitration clause defendants must show that Dillard voluntarily agreed to waive his Seventh Amendment rights. They must show that he gave his consent without duress, indeed that he had a choice between arbitration and jury and that he voluntarily consented to arbitration. Is that what they have shown? Quite to the contrary they make no allegation that he had any choice. In the brief of Securities Industry Association Inc. in prior appeal of H-88-2848 to 5th Circuit #89-2583 page 6 line 3 it states "While Dillard may not have a choice of forum [between jury and arbitration], that lack of choice does not establish tangible economic injury." Dillard submits to the court that he is certainly economically damaged for the purpose of establishing right to damages under the federal anti-trust acts. But his right to a Constitutional guarantee does not rest upon proof of economic injury nor upon proof that denial was unconscionable

and that the alleged waiver of his right to jury trial rests solely upon defendants providing proof of his voluntary, informed, consent. Defendants show no such proof instead they admit apparent "lack of choice". If there is no choice there is no waiver. This no choice no waiver imperative should be declared by injunction to restore Dillard's Constitutional rights and to restore the Constitutional rights of the investing public and to alleviate the damage being done to Dillard and to many others like him as a direct result of the broker's unrestrained monopoly.

The right of jury trial in civil cases is a basic and fundamental feature of federal jurisprudence which is protected by the Seventh Amendment to the Constitution of the United States. See Bailey v. Central Vermont R. Co. 319 US 350, 87 L ed 1444, 63 S.Ct. 1062.

Right to trial by jury is a right which is justly dear to the American people

and right to trial by jury should be jealously guarded by the courts. See Jacob V. City of New York, 315 U.S. 752, 86 L. Ed 1166, 62 S. Ct. 854.

Any curtailment of this right should be scrutinized with the utmost care. See Baylis v. Traveler's Insurance Co. 113 U.S. 316. The standard set by this court in the Baylis case was that right to trial by jury was absolute and inviolate unless there was waiver of the right "by consent of the parties".

Consent means voluntary agreement. But signing the adhesion contract which demanded compulsory arbitration in lieu of jury indicated only submission to the duress of the threat of restraint of the trade by the Securities Industry Association's monopoly.

There is a big difference between consenting and submitting. Every consent involves a submission; but a mere submission does not necessarily involve consent.

Consent is an act unclouded by duress. See Heine v. Wright, 76 Cal App 338, 244 P. 955, 956.

Consent is an act of reason, the mind weighing as in a balance the good or evil on each side. 1 story, Eq. Jur sec. 222 and Lervic v. White Top Cabs, La. App., 10 So. 2nd 67, 68, 73.

There is no "consent" to the monopolies uniform compulsory arbitration clause. The American public submits or it does not trade. The public's Constitutional right to demand trial by jury is stolen by the concerted power of the broker's monopoly.

There is no issue of monopoly. Monopoly is admitted by the Defendants. They did not deny the fact that their association controls over 95% of the defined options account market and over 90% of the defined margin account market. They did not deny the refusal of services to those who do not sign compulsory

arbitration contract; they did not deny the concert of action of the association in using a standard form adhesion contract compelling arbitration.

They did deny that the monopoly was created by conspiracy but conspiracy is a jury question.

What they fail to realize is that it does not matter if the monopoly was created legally. Even if it was created by an act of God, if it's result is monopolization of any part of the trade or commerce and if it restrains trade or if it serves to nullify a Constitutional right of the U.S. public; that monopoly must be broken. Dillard has so proposed starting with preliminary injunctive relief.

Right to trial by jury is nullified and made worthless by the concerted actions of substantially all of the providers of securities brokerage services. You have right to trial by jury unless you consent to sign that right away but you must sign the right away or the brokers monopoly

dictates that you shall not trade, and their association controls the entire market- so there is no consent and the Constitutional guarantee of right to demand trial by jury is nullified and worthless in transactions which comprise a substantial amount of the trade and commerce of this nation.

A monopoly which has the effect of nullifying a Constitutional guarantee is per se illegal and must be broken at least to the extent of it's harmful effect upon the Constitutional guarantee.

Each judge of this court enjoys his position by reason of his oath to protect and defend the supreme law of this land, the Constitution of the United States and the Bill of Rights thereof.

The Constitution of the United States is threatened by a powerful monopoly.

This court is honor bound to attack the monopoly.

Like the sworn soldier who has received his marching orders I expect this

court to attack the monopoly not as a matter of choice or discretion, but because on your oath as United States Supreme Court Judges you are absolutely required to strike down anything that destroys the integrity of a Constitutional right.

There is a clear and present danger to the Constitution of the United States; the Constitutional right to jury trial has been made a nullity by the concerted actions of a powerful monopoly. A Constitutional right cannot be restricted by legislative or judicial action; how then can a monopoly render it worthless? It can not!

The Constitution is the Supreme Law of this land and this court must protect and defend the American people's constitutional rights. The best way to do that would be to grant the Writ of Certiorari and then to consider the injunction.

"In determining any controversy arising under anti-trust laws, the interests of the consuming public are paramount." 315 U.S. 143, 86 L. Ed. 750.

The industry-wide standard form arbitration clause in the contract with Merrill Lunch was forced upon Dillard lest he could have no service and a similar arbitration clause was refused by him at Drexel, Burnham, Lambert, Incorporated, and he was denied service. Dillard has pleaded that nowhere could he find any provider of margin and option account services which would provide the services without compulsory arbitration. Both the refused and accepted under duress contracts have been entered as Exhibits in H-85-4135.

Securities Industry Association admits that "all securities brokers customers trading contracts contain arbitration clauses..." and in its pleading Merrill Lynch admits the same fact. Plaintiff submits to the Court that it should take judicial notice of this admission of accomplished monopoly.

In short: defendants' conduct and the resulting monopoly are per se violations of

substantive federal law and nothing can save them. Even when group boycotts or concerted refusals to deal operated to lower prices or temporarily to stimulate competition, they are banned by the Sherman Act. The rule of per se violations as to group boycotts or concerted refusals to deal has been based by the courts on the ground that such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to do business in accordance with their own judgement; De Filippo v. Ford Motor Co. (1975, CA3 Pa) 516 F2d 1313, cert den 423 US 912, 46 L Ed 2d 141, 96 S Ct 216.

Without the imposition of judicial restraints every powerful combination could exempt itself from the rule of law by exerting the economic power of adhesion demand upon threat of restraint of trade.

The renters of most of the supply of motion pictures in the late 1920's did exactly what the brokers have done 65 years

later. The motion picture monopoly was prohibited by injunction by this court from compelling adhesion arbitration -- and this court must hold the broker's monopoly to the same standard as the Paramount case 34 F. 2nd 984, 282 U.S. 30.

Asserting Dillard's rights under federal antitrust law should be likened to a private Attorney General who protects the public's interest. See Waldron v. Cities Service Co., 361 F.2d 6712, 673 (2d Cir. 1966), cert. granted, 385 U.S. 1024, 87 S. Ct. 743, 17 L. Ed, 2d 672 (1967). Dillard has made request for declaration of class action under F.R.C.P. 23.

In American Safety Equipment Corp v. J.P. Maguire & Co. 391 F.2d at 825, the court recognized that "[a] claim under the antitrust laws is not merely a private matter', because private antitrust actions are an integral part of the effort of the antitrust laws 'to promote the national interest in a competitive economy." 391

F.2d at 826.

The instant action claim under the antitrust laws is not merely a private matter; it affects thousands of investors who are cheated of staggering sums by the concerted action of the brokerage monopoly.

Monopolization, attempt to monopolize and conspiracy to monopolize are separate offenses and the instant complaint charges all three. Please see: Mt. Lebanon Motors, Inc. v. Chrysler Corp. 283 F. Supp 453 (D.C., Pa 1968).

Dillard asked the district court and the Fifth Circuit for a summary judgement against defendants on violation of monopolization restraints under Section 2 of the Sherman Act. Dillard asked the district court for a preliminary injunction and for a permanent injunction and Dillard asked the Fifth Circuit for "... preliminary injunction pending trial." Dillard now asks this court for a summary judgement and an appropriate injunction prohibiting continued monopolization.

> "Every person who shall monopolize... or combine... with any other person or persons, to monopolize any part of the trade or commerce... shall be deemed guilty of a felony" - Sherman Anti-Trust Act.

The monopoly is defined as pervasive in two markets: (1) in margin accounts contracts and (2) in option accounts contracts, within the United States. The monopolists are defined as the members of Securities Industry Association who offer margin accounts or options accounts only if the customer signs standard compulsory arbitration agreement.

There is no genuine issue of material fact about the existence of the monopoly or of exclusionary and coercive conduct by the monopolists. Merrill Lynch calls the monopoly's concerted refusal to deal "conscious parallelism". Dillard calls it a group boycott. But regardless of what you call it there is no doubt that the use of monopoly power to contravene the 7th Amendment (by forcing compulsory arbitration) is a violation of the Section

2 provision of the Sherman Act proscribing monopolization.

Specific illegal intent is not necessary for a violation of Section 2. All that matters for Section 2 purposes is the fact of a restraint of trade by monopolistic practice which is obviously clearly demonstrated and is not at issue. Therefore Dillard moves that this court declare monopoly proven and that this court issue order restraining the monopolists from restraining trade. This can be done by injunction prohibiting attempts by the monopolists to enforce upon Dillard and upon the American public generally, adhesion contracts mandating compulsory arbitration.

Huge sums are lost to the public as a result of the monopoly indemnifying itself against court ordered damage awards and the restraints imposed upon those who resist is harmful to trade and commerce. It is common knowledge and it is admitted by the

defendants that those who resist are excluded from trading. Restraint of trade is injurious to a healthy economy. Therefore we have all the elements necessary for injunction to issue:

1. Monopoly
2. Exclusionary Behavior
3. Fact of Resultant Damage

Immediate injunction is requested because of the irreparable damage being done to the consumers of securities brokerage services and the clear violations of both constitutional and anti-trust law as well as violation of traditional standards of equity.

This court should overrule the Fifth Circuit and uphold by injunction the fair standard of the strict enforcement of voluntary when made arbitration contracts and the prohibition of enforcement of involuntary when made, compulsion by monopoly, arbitration contracts. Legally that is the current standard, but it is not well known or defined since compulsion by monopoly in the making of the agreement to

arbitrate has not been plead since the Paramount Famous Lasky case 34 F. 2nd 984, 282 U.S. 30. Such a standard conforms to all previous legal decisions of this court.

Please see different Paramount case: United States v. Paramount Picture, Inc. (1948) 334 U.S. 131, 142 68 2. CT. 915, 921, 92 L. ED. 2D 1260, 1285 wherein it shows that "In granting an injunction under federal anti-trust acts equity may enjoin conduct which is not illegal per se..."

The greatest assault upon the institution of trial by jury since the founding of the Republic is made by Securities Industry Association by reason of its organization of monopoly power and group boycott which has as its goal and has as its natural and unavoidable consequence to deny Americans their Constitutional rights to trial by jury.

Securities Industry Association and its fellow monopolists are expanding the number and type of accounts that employ

adhesion arbitration upon pain of no services. The monopolists have total control of the defined market: margin and option accounts. This is a classic monopoly as defined by the Sherman Anti-Trust Act.

The pleadings have evidenced the facts of the illegal contract and defendants have failed to even deny the key fact which is compulsion by monopoly in the making of the agreement to arbitrate.

Section 4 of the Federal Arbitration Act provides that: "If the making of the arbitration agreement... be in issue, the court shall proceed summarily to the trial thereof."

Under Section 4, Dillard, by motion in the one action, H-85-4135, and in original complaint in the other action, H-88-2848, demanded trial of the issue of illegal and void arbitration contract due to the duress of restraint of trade and due to illegal compulsion by monopoly in the making of the agreement to arbitrate. The motion has

been ignored and the complaint has been abated and arbitration has been ordered without proper adjudication of the contract dispute in either action. Or, if there was an adjudication then Rule 52 motion for findings of fact and conclusions of law on that adjudication was improperly denied.

The district court order in H-85-4135 states that there was no contract issue because the complaint did not include pleadings attacking the contract to arbitrate. The contract issue had not yet become an issue at the time the complaint in H-85-4135 was drafted. Only when defendant Merrill Lynch attempted to compel arbitration of the complaint did arbitration become an issue. The federal rules provide for objections to an arbitration contract to be made by motion under the provisions of F.R.C.P. 7,8,10, and 12. The facts showing no contract were well pleaded in the motions as an issue preliminary and incidental to the proper

adjudication of the original complaint and therefore the contract issue should have been addressed instead of being ignored.

The arbitration contract issue which is complaint that there is no contract to arbitrate due to illegality in the making of the agreement to arbitrate was abundantly pleaded in the motions in H-85-4135 as an issue and it was well plead in the original complaint in H-88-2848 as a cause of action. H-85-4135 and H-88-2848 were consolidated upon appeal by order of the Fifth Circuit. Is the position of the Fifth Circuit that the contract issue can be ignored because it can not be raised by motion? Or is it that the motion pleading was deficient because it failed to conclusively prove that arbitration was unfair and unconscionable? Both positions are incorrect and are unsupportable. And even were they to be correct (and they are not) Rule 52 mandated an explanation and an explanation is most especially necessary when the litigant requesting it is pro se.

The district court and the Fifth Circuit have violated the "shall proceed summarily" mandate of Section 4 of the FAA. Please see: Refinery Employees Union v. Continental Oil Co. 268 F. 2nd 477 (Fifth Circuit 1959): "Where party to contract providing for private arbitration asks court for a decree ordering specific performance of contract to arbitrate, court, before rendering such a decree, has obligation of determining as a preliminary matter, that other party has contracted to refer issue involved to arbitration."; and Wicks v. Atlanta Marine, Inc. 605 F. 2nd 166, 168 (Fifth Circuit, 1979) "Arbitration induced by fraud must be judicially determined before stay can issue."; and Eastern Marine Corporation v. Fukaya Trading Co. 364 F. 2nd 80 (Fifth Circuit, 1966) Certiorari denied 87 S. Ct. 508, 385 U.S. 971, 17 L. Ed. 2nd 435. "Arbitration may not be compelled as to issue of whether contract was ever made or was void for illegality but other issues

are arbitrable."; and Robert Lawrence Co. v. Devonshire Fabrics, Inc. C.A.N.Y. 1959 271 F. 2nd 402 Certiorari dismissed 81 S. Ct. 27, 364 U.S. 801, 5 L Ed. 2nd 37. "If arbitration clause itself was induced by illegality, there can be no arbitration and there must be judicial trial of that question before stay can issue pending arbitration."

It is of exceptional importance for this court to find that the monopoly should be restrained by permanent injunction or in the alternative by preliminary injunction pending the trial and for this court to issue an injunction. Dillard does so move the court.

The injunction can be quite simple. It should include a finding that contracts for margin accounts and option accounts provided by brokerage and securities services companies to the public for trade and commerce in stocks, bonds and options can not require acceptance of an arbitration provision as a pre-condition to

trade and commerce in stock, bonds and options; this order being necessitated by a finding that in excess of 90% of the providers of these financial services have made acceptance of an arbitration provision a precondition to trade and commerce in stocks, bonds and options within said margin and option accounts.

Therefore their mutual action has resulted in adhesion arbitration having monopoly power which is a monopolization as proscribed by Section 2 of the Sherman Act; this irresistible economic power robs the public of consent and without consent any agreement allegedly waiving the fundamental Constitutional right of trial by jury, under the Seventh Amendment guarantee, must be void.

Therefore the arbitration agreement in this action is void as are all like arbitration agreements which have similarly been imposed by the monopoly by restraint of the trade of those who refuse to agree

to arbitrate disputes in place of judicial determination or jury trial.

The Fifth Circuit declined to read all of Dillard's complaints together although the actions had been consolidated. The "tangled web of litigation" was not of Dillard's making. Dillard tried repeatedly to add to existing complaint by motion to amend complaint (ignored) and by filing supplemental complaint (stricken). So filing a new complaint was his only recourse. Then he tried repeatedly to consolidate (denied) but the district court would not allow that either, leading to endless argument about what had been or should be decided where. Rule (8)F requires that "all pleadings shall be so construed as to do substantial justice" which in this instance means that all the complaints should be considered as a whole.

The crime of false imprisonment is well pleaded and it is a substantial violation of civil rights under Title 42; although the Fifth Circuit improperly

affirmed dismissal of the civil rights complaint for failure to state a claim.

The Fifth Circuit did not review dismissal of Dillard's extortion complaint under the Hobbs Act because they said he did not raise the issue but in fact he did raise the issue on page 5 of Addendum to the Brief of Appellant which was filed with the permission of the Fifth Circuit wherein Dillard complained that: "... the R.I.C.O. complaint, Extortion Complaint, Abuse of Process by Extortion Complaint, and Title 42 civil rights violations are all properly plead." If indeed there were no private right of action it could not be properly plead and therefore Dillard raised the issue of private right of action for violation of the Hobbs Act claiming injury due to extortion under color of official right. Dillard claims private right of action for violation of the Hobbs Act under the provisions of the R.I.C.O. Act.

Survival of Dillard's fraud claim against Merrill Lynch does not rest upon private right of action under Section 17(a) because of other private rights of action also plead. But Dillard requests that the standard of proof that is required for recovery under the law be no greater than that required under Section 17(a) of the Securities Act of 1933, 15 U.S.C. Sec 77Q. The Fifth Circuit has declared that there is no private right of action under Section 17(a). This issue divides the circuits. Other circuits such as the Second Circuit have long allowed private right of action under 17(a).

Certain statements in the opinion of the Fifth Circuit purported to be fact are incorrect and misleading. The injury caused by Merrill Lynch was not that the stock was liquidated, which it was, it was that the stock was liquidated prior to it being delivered to Dillard. The stock was never received although Dillard had paid hundreds of thousands of dollars to Merrill

Lynch including the purchase of guaranty insurance to absolutely guarantee the delivery.

The Fifth Circuit's allegation of a deficit of $5,000 in Dillard's Merrill Lynch account is not an agreed fact - Dillard has stated that the account should have had a $250,000 positive balance at time he attempted to transfer funds. Merrill Lynch never even answered the complaint and nowhere in the record of any action does Merrill Lynch allege a $5,000 deficit. The status of that account is at issue and there has been no discovery and no adjudication. It is a defamatory abuse for the Fifth Circuit to state this "fact" in the record.

The Fifth Circuit states a failure to buy as the basis for certain of Dillard's claims against Security Pacific. The Fifth Circuit knows but neglects to disclose that the order to buy was a short sale covering. Under the law Security Pacific was

absolutely required to buy: if Dillard ordered it or if the account were not properly margined since a buy was absolutely required in any event for elimination of the short position. These statements of "fact" are in violation of normal standards of fairness and judicial restraint.

This court should study the original records of the instant actions which clearly show improper ex parte contact between the court at Houston and the defendants. At Houston normal rules of fairness are often ignored to the injury of pro se litigants and the pleading standards demanded of pro se litigants are more stringent than for members of the bar. Pro se litigation is unconscionably delayed or summarily dismissed - it never comes to trial. This court needs the entire record of the instant actions for proper analysis - but an analysis of the docket sheets alone will give some indication of the problem. The docket sheets are the wrong

size to be bound in this booklet so 40 copies have been sent to your clerk, in the separate appendix, and should be available upon request.

The chief judge at Houston encourages abrogation of the rules in order to "do something" to suppress pro se litigation generally which he regards as a total waste of time. Please see: Elmore v. McCammon 640 F. Sup. 905 (S.D. Tex. 1986). The 1985 and 1986 actions were on his docket for a time until Dillard complained about unconscionable delay and ex parte contact and he removed himself as judge.

The Fifth Circuit has refused to take any supervisory action on Dillard's complaints that the United States District Court for the Southern District of Texas, Houston Division is denying pro se litigants their federally guaranteed right of effective court access.

Dillard has brought to your attention a few problems with parts of the judicial

system over which you have control. He urges you to remember that it is bad form to kill the messenger. Although that is a way to hear only good news; it is unhealthy for the system because problems are hidden rather than remedied. Please understand that Dillard has the greatest respect for the federal judicial system; indeed, the bulk of his complaint pleads for protection of our Constitutionally guaranteed judicial system from being supplanted by private arbitration compelled by irresistible economic power.

For any or all the foregoing reasons this Supreme Court of the United States should grant Writ of Certiorari.

Dated: Grants Pass, Oregon
August 12, 1992

Respectfully Submitted,

Carvel Gordon Dillard, pro se
903 SW Central
Grants Pass, OR 97526
(503) 479-0098